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Office of Government Ethics
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**Opinion Issued to a Department's
Designated Agency Ethics Official
dated January 7, 1983**

This is in response to your August 11, 1982, request for a formal advisory opinion on the question "whether, or under what circumstances, a federal employee's vested rights in a private corporation's pension plan constitute a 'financial interest' under 18 U.S.C. § 208, so as to bar the employee's participating in a contract or other particular matter involving that corporation."¹

Section 208(a) reads as follows:

Except as permitted by subsection (b) hereof [providing for waivers], whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, a Federal Reserve Bank director, officer, or employee, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest--

Shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

At the outset it is worthwhile to note that our inquiry under the statute is whether, or under what circumstances, a Government employee's vested rights in a private corporation's pension plan

give him either a direct or derivative financial interest in a particular matter, rather than when or whether the employee has a financial interest in the corporation.²

A Government employee has a financial interest in a particular matter when there is a real possibility that he might gain or lose as a result of developments in or resolution of the matter. Section 208 does not require that the financial interest be substantial. It is not necessary that the potential gain or loss be of any particular magnitude. Nor must the potential gain or loss be probable for the prohibition against official action to apply. All that is required is that there be a real, as opposed to a speculative, possibility of benefit or detriment.³

The short answer to your question, then, is that a Government employee's vested rights in a private corporation's pension plan give him a financial interest in a particular matter whenever, by virtue of such vested rights, the employee is in a position to gain or lose from developments in or resolution of the matter. Whether a financial interest exists in any particular case will thus depend on both the nature of the particular matter and the terms of the pension agreement. Because of the broad range of variables in each of these factors, we have found it impossible to devise a formula that will provide the answers, in advance, to every question that might fall within the scope of your broad inquiry. It is possible, however, to make some general statements about some commonly occurring situations.⁴

Pension plans come in many shapes and sizes, and we readily concede that familiarity with all of the variations is beyond the capacity of this Office. However, we understand that in a typical plan contributions are made by the employer, the employee, or both; the funds are held by trustees, who may or may not be employed by the sponsoring organization; and the funds will be invested, often but not always, in the stock of the sponsoring company. Most plans fall into two major categories: defined contribution plans and defined benefit plans. In the case of defined contribution plans, a separate account is maintained for each participant in the plan, and the amount of benefits paid upon retirement is a function of the amount contributed and investment performance. In the case of defined benefit plans, contributions to the plan are held and invested together, and each participant receives a fixed amount of benefits when he retires. In some cases pension benefits are paid simply by the purchase of an annuity for each

participant.⁵

This Office and the Office of Legal Counsel at the Department of Justice have consistently taken the position that when a Government employee has vested rights in a pension plan of a corporation, and the pension plan holds stock of the corporation, the employee ordinarily has a financial interest in matters affecting that corporation.⁶ There is unquestionably a real possibility that the employee may gain or lose as a result of the outcome of the matter, and this is all section 208 requires.⁷ We are also of the view that where a pension fund is controlled by employees of the sponsoring organization, the Government employee ordinarily has a financial interest in matters affecting the organization. This is because the employee/trustees are acting as representatives of the sponsoring organization, and their management of the plan may be affected by developments in matters affecting that organization.

In your request for our opinion, you suggested that even where the pension plan holds stock of the sponsoring organization and/or is controlled by employees of the organization, a Government employee having vested rights in the plan does not have a financial interest in matters affecting the organization if the plan is insured by the Pension Benefit Guaranty Corporation (PBGC). We do not agree.

Title IV of the Employee Retirement Income Security Act of 1974 (ERISA) established the PBGC to provide termination insurance covering most defined benefit pension plans. Upon termination of a covered plan, the PBGC guarantees the payment of benefits vested under the plan within the limits specified in ERISA. Our review of the statute and our consultations with attorneys at the PBGC and the Department of Labor have led us to conclude that the insurance payments payable under ERISA upon plan termination will often if not always be less than the benefits a participant would receive upon retirement from a viable pension fund.⁸ Consequently, coverage by ERISA does not obviate the real possibility of loss which is sufficient to create a financial interest under 18 U.S.C. § 208. Moreover, the availability of plan termination insurance is not relevant to the possibility that a Government employee may benefit from the outcome of matters having a beneficial effect on the organization sponsoring the plan.⁹

Even where the pension plan under consideration neither

holds stock of the sponsoring organization nor is controlled by organization employees, the determination whether a financial interest in a matter exists, and if so whether it is waivable, must be made on a case by case basis. Where an annuity purchased for a Government employee under a pension plan has been fully paid for, he will ordinarily not have a financial interest in matters affecting the sponsoring organization. However, he may under some circumstances have a financial interest in matters affecting the company responsible for making the annuity payments. In the case of a defined contribution plan, where contributions are no longer being made on behalf of the Government employee and his account is held by an independent trustee, it seems that the possibility that the employee might gain or lose as a result of matters affecting the sponsoring organization is purely speculative and thus not cognizable under section 208(a). Where, on the other hand, the Government employee's vested rights are in a defined benefit plan, matters affecting the sponsoring company may well affect the company's ability to maintain adequate funding levels or to pay benefits when due with the result that the Government employee has a financial interest in such matters under section 208(a). The provisions of ERISA do not change our conclusion, although the availability of insurance may, along with other factors, be relevant to a decision whether a waiver is appropriate under section 208(b)(1).

In sum, we recognize that making case by case determinations regarding financial interests that arise from pension plan participation may occasionally burden your agency and others. Nonetheless, we are constrained to conclude that such determinations are required. It has been our experience that the typical pension plan is so intertwined with the sponsoring organization that a Government employee holding vested rights in the plan must be deemed to have a financial interest in matters affecting the organization. We feel that the burden is properly on the Government employee participating in a pension plan to show otherwise.

In accordance with the provisions of 5 C.F.R. § 738.308 (a)(2), we have consulted with the Office of Legal Counsel of the Department of Justice prior to issuing this formal advisory opinion. We are authorized to state that the Office of Legal Counsel agrees with our analysis and conclusions.

Sincerely,

David R. Scott
Acting Director

1 By letter dated August 18, 1982, you were notified that this Office had reviewed your request and had determined in accordance with 5 C.F.R. § 738.305(a)(1) that it was one which the Office would answer with a formal opinion. Shortly thereafter, we circulated to all executive branch Designated Agency Ethics Officials a notice of your request, seeking their views on the issue raised. We received many valuable comments, and we have taken them into consideration in the preparation of this opinion.

2 See, by way of contrast, the predecessor of section 208, which provided:

Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than \$2,000 or imprisoned not more than two years, or both. 18 U.S.C. § 434 (1958).

Under section 434, the appropriate inquiry was whether the Government employee had a financial interest in the business entity. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1 (1926).

3 Financial interests that are insubstantial, remote, or inconsequential can be dealt with under the waiver provisions of 18 U.S.C. § 208(b), which provides in pertinent part:

Subsection (a) hereof shall not apply (1) if the officer of employee first advises the government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other

particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect from such officer or employee, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of the government officer's or employee's services.

4 Whether or not a financial interest exists depends on a number of factual variables. Therefore, we do not believe it possible to determine in the abstract whether a vested interest in a pension plan is a "financial interest" for purposes of section 208(a). Whether or not a financial interest in a matter held by virtue of vested rights in a pension plan will be "too remote or too inconsequential" to affect the integrity of the Government employee's services will also depend on both the nature of the matter and the terms of the plan. Consequently, a waiver by general rule or regulation of all financial interests held as a result of pension rights would not be proper under section 208 (b)(2). However, it may be possible for an agency to determine that financial interests held in a commonly occurring type of particular matter as a result of employee held rights in certain kinds of pensions do meet the criteria for waiver by general rule or regulation under such circumstances.

5 For a thorough treatment of the characteristics and operation of various types of pension plans, see D. McGill, *Fundamentals of Private Pensions* (4th ed. 1979).

6 See e.g., February 3, 1978, Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel to Barbara Allen Babcock, Assistant Attorney General, Civil Division 7-9. See also R. Perkins, *The New Federal Conflicts of Interest Law*, 76 Harv. L. Rev. 1113, 1131 (1963), and Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* (Cambridge, Mas.: Harvard University Press, 1960), p. 218.

7 Of course, there may be some flexibility in the phrase "matters affecting the corporation," but virtually all matters affecting a company can affect the value of its stock, and an employee with vested rights in the purposes of section 208(a), neither the value or the employee's vested

rights nor the magnitude of the plan's stock holding is of consequence. These factors may, however, be significant for purposes of individual waivers under section 208(b)(1).

It is conceivable that a Government employee with have a financial interest in matters affecting other companies the stock of which is held by a pension plan in which he has vested rights. Little attention has been given to this type of situation in the past, perhaps because of section 208's requirement that a financial interest be waived in order for the ban on participation to apply. We see no need to focus on the issue here, but note that it may present problems in some particularized cases.

8 See McGill, *supra* note 4, chapter 21 and the relevant statutory provisions (codified at 29 U.S.C. § 1301 et seq) and regulations (29 C.F.R. Chapter XXVI).

9 We emphasize that our analysis does not by any means foreclose a showing in a particular case that the availability of insurance coupled with particular pension plan terms viewed in connection with a particular matter would result in a showing of no financial interest under section 208(a) or a waivable interest under section 208(b)(1). See pp. 2-3 *supra*.